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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 332

THE BOOKCASE, INC. and IRWIN WEISFELD,

Appellants,

—against—

HOWARD R. LEARY, as Commissioner of Police of the City of New York and FRANK S. HOGAN, as District Attorney of New York County,

Appellees.

MOTION TO DISMISS

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Opinions Below

The opinion of the New York Court of Appeals was rendered on July 7, 1966 and has not as yet been reported. The opinion of the Supreme Court of the State of New York, County of New York, where this action was brought, is reported in 49 Misc 2d 355, 267 N.Y.S. 2d 415.

Statement

Penal Law, of the State of New York, sec. 484-h forbids the sale to a minor under the age of seventeen of any book, magazine, photograph, etc. that depicts or contains descriptions of nudity, sexual conduct, or

sado-masochistic abuse and which is harmful to minors. The latter nouns and the phrase "harmful to minors" are explicitly defined in subdivision 1 of the statute.

Section 484-i forbids the sale to minors under the age of eighteen of any book, magazine, etc. containing descriptions of acts of sexual activities which would appeal to the lust or curiosity of such minors, excluding medical or biological textbooks.

Violation of either statute is punishable as a misdemeanor.

The Complaint (R. 9-12)

The corporate plaintiff is a retail bookseller and the individual plaintiff is its president (Complaint, pars. "First and Second"). The gravamen of their complaint is contained in paragraphs "Thirteenth" and "Seventeenth". In the former they allege that the statutes above mentioned

> "are severally unconstitutional in violation of the Fourteenth Amendment to the Constitution of the United States in that the prohibition of the sale or dissemination of literature to a person under 18 years and 17 years of age, respectively, or under any age, is an infringement of the right of the freedom of the press". (R. 11)

In paragraph "Seventeenth" plaintiffs assert the unconstitutionality of the statutes upon the same ground but in abbreviated form:

> "The plaintiffs claim that sections 484-i and 484-h of the Penal Law severally are an invasion

of plaintiffs' constitutional rights under the Constitution of the United States as aforesaid in that the dissemination of literature may not be impaired on the basis of the age of the purchaser." (R. 11-12)

The complaint (pars. "Sixth" and "Twelfth") alleges that in *Larkin* v. *Putnam's Sons*, 14 N Y 2d 399 200 N.E. 2d 760, the Court of Appeals of the State of New York held that the book entitled "The Memoirs of a Woman of Pleasure" by John Cleland, popularly known as "Fanny Hill" is not obscene. Paragraph "Fourteenth" of the complaint alleges that this book "contains details, descriptions or narrative accounts of acts of sexual intercourse" and is "embraced within the scope and intendment of said statutes".

The appeal should be dismissed for lack of a substantial constitutional question and for lack of finality.

(1)

The theory upon which this action for a declaratory judgment was brought is that the states are without the power to forbid the sale to minors below a designated age of material which is not obscene under the *Roth* test (*Roth* v. *United States,* 354 U. S. 476 [1957]). Relying upon statements by this Court in *Roth* and in *Smith* v. *California,* 361 U. S. 147 (1959), plaintiffs say that the dissemination of only obscene matter may be constitutionally prohibited; that obscenity is the sole test of constitutionality and that unless the material is obscene its dissemination may not be banned regardless of the age of the purchaser.

In *Butler* v. *Michigan,* 352 U. S. 380, 384 (1957) this Court intimated and in *Jacobellis* v. *Ohio,* 378 U. S. 184, 195 (1964) it was held that the states may constitutionally prohibit the sale to children of matter deemed harmful to them although not obscene under the *Roth* test. This principle was also stated in *Larkin* v. *Putnam's Sons,* 14 N Y 2d 399, 417, 200 N.E. 2d 760 (1964), in *People* v. *Kahan,* 15 N Y 2d 311, 312, 206 N.E. 2d 333 (1965) and in *State* v. *Settle,* 90 R.I. 195, 156 A. 2d 921 (1959), which was cited with approval in *Jacobellis* v. *Ohio, supra.* cf. *Prince* v. *Massachusetts,* 321 U. S. 158, 165-168 (1944).

It is thus clear that the states may constitutionally enact legislation banning dissemination to children of material harmful to them under standards that could not be constitutionally applied to adults. The statutes are free of the alleged constitutional infirmity upon which the complaint is based.

(2)

Plaintiffs invoke the jurisdiction of this Court under 28 U. S. C. §1257(2), which authorizes an appeal from a final judgment or decree "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity".

The judgment of the New York Supreme Court does not establish the constitutional validity of the challenged statutes. As was noted by that Court (R. 20), the "sole basis for the requested constitutionality

declaration" is plaintiffs' claim that the New York Legislature has attempted to establish a ban on the dissemination of literature based on the age of the purchaser. The judgment of that Court did no more than to reject plaintiffs' limited objection to the constitutionality of the statutes.

The New York Court of Appeals, in affirming the judgment below, said (Jur. St., App. A., p. 12):

> "Appellants are now seeking a judgment declaring these [statutes] unconstitutional. Their challenge, however, is limited *solely* to the power of the state to pass such statutes. They are *not* challenging (as they did in *Bookcase, supra*) the particular statutes on grounds of vagueness, lack of proper scienter requirements, and other problem areas normally involved in a constitutional challenge to the validity of obscenity laws.*

---

* Appellant in *People* v. *Tannenbaum* (17 N Y 2d —), decided this day, did challenge section 484-i on grounds of vagueness and lack of proper scienter requirements."

(The statement in the Court's footnote that *People* v. *Tannenbaum* was decided the same day that this opinion was handed down [July 7, 1966] is incorrect. The Court has not decided *Tannenbaum* [see New York Law Journal, July 12, 1966, col. 5] and will not decide it until after the Court reconvenes in September. The opinion of the Court of Appeals as printed in Appendix A to the Jurisdictional Statement is a reproduction of an unofficial opinion issued by that Court and marked "Unrevised and Uncorrected. Not for Publication." It is anticipated that when the opinion is revised for inclusion in the official reports

the reference to the decision in *Tannenbaum* will be corrected.)

In the concluding paragraph of its opinion the Court of Appeals said (Jur. St., App. A., p. 19):

> "The Legislature, after many years of careful study, has decided that certain kinds of written matter, though suitable for adult consumption, should be kept away from children. A prior statute with that objective was ruled unconstitutional for vagueness. The challenge here to sections 484-h and 484-i does not include such grounds. *We hold only that the Legislature has the constitutional power to pass such a statute.* Questions of vagueness and scienter requirements must await other cases. (See *Tannenbaum, supra.*)" (emphasis added.)

Judge VAN VOORHIS dissented "upon the ground that jurisdiction should not be assumed to render declaratory judgment of a question of constitutionality in the abstract without ruling upon the validity of any particular statute." (*ibid.*)

It is thus clear that all the Judges of the Court of Appeals were in agreement that the Court did not adjudicate the constitutional validity of the challenged statutes. The jurisdictional basis for this appeal is, therefore, lacking for the reason that there is no decision by the highest court of the state "in favor of [the] validity" of the statutes. 28 U. S. C. §1257(2).

CONCLUSION

The motion to dismiss the appeal should be granted.

July 15, 1966.

Respectfully submitted,

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